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Supreme Court, U.S.
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No. 01-1858

In the

Supreme Court of the United States

JAMES IHNEN AND LISA IHNEN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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9 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REPLY ARGUMENT 1
CONCLUSION 5

TABLE OF AUTHORITIES

CASES

ARONSOHN V. COMMISSIONER, 988 F.2D 454 (3RD CIR. 1993) 3

BADWAY V. UNITED STATES, 367 F.2D 22, 25 (1ST CIR. 1966) 2

BANK OF NEW YORK V. UNITED STATES, 170 F.2D 20, 24 (3RD CIR. 1948) 3

BENNETT V. UNITED STATES, 231 F.2D 465 (7TH CIR. 1956) 3, 4

BENSON V. UNITED STATES, 1[illegible] F.3D 270 3

BOTANY WORSTED MILLS V. UNITED STATES, 278 U.S. 282 (1929) 1

BOTANY WORSTED MILLS V. UNITED STATES, 63 CT.CL. 405 (1927), AFF'D 278 U.S. 282, 286-87 (1929) 1

CAIN V. UNITED STATES, 255 F.2D 193 (8TH CIR. 1958) 2

CONTINENTAL OIL CO. V. JONES, 177 F.2D 508 (10TH CIR. 1949) 3

ELBO COALS, INC. V. UNITED STATES, 763 F.2D 818 (6TH CIR. 1985) 2

GENERAL SPLIT CORP. V. UNITED STATES, 500 F.2D 998 (7TH CIR. 1974) 4

JOYCE V. GENTSCH, 141 F.2D 891 (6TH CIR. 1944) 2

LEFEVER V. COMMISSIONER, 100 F.3D 778 (10TH CIR. 1996) 2

LIGNOS V. UNITED STATES, 439 F.2D 1365, 1368-69 (2ND CIR. 1971) 3

STAIR V. UNITED STATES, 516 F.2D 560 (2ND CIR. 1975) 3

UINTA LIVESTOCK CORP. V UNITED STATES, 355 F.2D 761 (10TH CIR. 1966) 3

UNITED BUSINESS CORP. OF AMERICA V. COMMISSIONER, 19 BTA 809, 831 (UNITED STATES BOARD OF TAX APPEALS 1930) 2

UNITED STATES V. GURLEY, 415 F.2D 144, 147 (5TH CIR. 1969) 2

WHITNEY V. UNITED STATES, 826 F.2D 896 (9TH CIR. 1987) 4

STATUTES

26 U.S.C. § 2032A 3

OTHER AUTHORITIES

FRCP 8(c) 2

REPLY ARGUMENT

The United States' attempt to distinguish *Botany Worsted Mills v. United States*, 278 U.S. 282 (1929) from the case at bar is clearly without merit. That the applicable statute of limitations on assessments by the United States had not yet run when Botany made its claim for refund to the IRS has no bearing on the estoppel analysis; the salient issue is that the statute of limitations had indeed expired before Botany filed its Petition in the United States Court of Claims for recovery of the taxes in dispute. *See Botany Worsted Mills v. United States*, 63 Ct.Cl. 405 (1927), aff'd 278 U.S. 282, 286-87 (1929). The Court of Claims denied the petition on the ground that it would be inequitable for Botany to recover under its Petition while "hold[ing] to the advantage derived from the settlement." *Id.* 278 U.S. at 287. Clearly it is the timing of the commencement of the legal action for recovery of taxes, *vis a vis* the Government's statute of limitations to assess additional taxes and counterclaim therefor, which is salient to the estoppel argument. The date of the administrative claim for refund is of no relevance.

In *Botany*, before this Court, on certiorari to the Court of Claims, the Solicitor General essentially abandoned the case, offering no argument, admitting that the settlement agreement was not binding, and conceding that "[n]o ground for the United States to claim estoppel is disclosed in the findings." *Id.* at 287-88. "Independently of these concessions," this Court found that the informal settlement agreement was not binding and that "the findings disclose no adequate ground for any claim of estoppel by the United States." *Id.* at 288-89. Accordingly, while this Court did reserve the question of whether an informal settlement agreement may be binding under "some circumstances," those circumstances would as a matter of law have to be in some *material* way distinguishable from those presented in the *Botany* case. The United States has failed to articulate any rationale to support the supposition that the timing of the administrative claim for refund is a material distinction. That argument was never

raised at either the District or Circuit Court level. The timing of the administrative claim is a meaningless red herring.

Indeed, in *Cain v. United States*, 255 F.2d 193 (8th Cir. 1958), upon which the District Court and the Circuit Court below relied in granting and affirming summary judgment herein, the taxpayer Cain filed a claim for refund with the Commissioner of Revenue two years before the IRS's statute of limitations to assess additional taxes expired, and then brought his action in District Court after the statute of limitations expired. *Id.* at 194, 195. That scenario is similar to the one which occurred in *Botany*. In flat contradiction to the *Botany* decision, the *Cain* court held that estoppel must lie. Per *Cain*, the estoppel issue arises when the statute of limitations against further IRS assessments runs. *Id.* at 199. By definition, a statute of limitations is an affirmative defense in a lawsuit, nothing more. FRCP 8(c); *United States v. Gurley*, 415 F.2d 144, 147 (5th Cir. 1969); *Badway v. United States*, 367 F.2d 22, 25 (1st Cir. 1966); *United Business Corp. of America v. Commissioner*, 19 BTA 809, 831 (United States Board of Tax Appeals 1930). Clearly, the date of the administrative claim for refund has no relevance to the statute of limitations or the estoppel analysis. Just as clearly, the *Cain* decision and the Eighth Circuit's decision below are irreconcilable with this Court's clear mandate in *Botany Mills*.

The United States also contends that there is no conflict among the circuits with respect to this issue. However, scrutiny of the cases reveals only that there are conflicts *within* certain circuits, as well as among the various circuits. For example, the Sixth Circuit correctly ruled for the taxpayer on the estoppel issue in *Joyce v. Gentsch*, 141 F.2d 891 (6th Cir. 1944), but incorrectly applied estoppel in *Elbo Coals, Inc. v. United States*, 763 F.2d 818 (6th Cir. 1985). The Tenth Circuit decision in *LeFever v. Commissioner*, 100 F.3d 778 (10th Cir. 1996) did not involve a closing agreement but instead involved the "duty of consistency" where taxpayers valued certain land under the

special use valuation election, 26 U.S.C. § 2032A, in early years and, after the statute of limitations expired on the IRS to re-assess, recharacterized the land in a blatant attempt at tax gamesmanship. *Id.* at 781. This was a different issue than that raised in *Uinta Livestock Corp. v United States*, 355 F.2d 761 (10th Cir. 1966), which involved the precise issue in the case at bar; i.e., whether execution of an informal closing agreement gives rise to an estoppel in a refund case after the government's statute of limitations to assess additional taxes has lapsed. *Id.* at 767. Nor was *Continental Oil Co. v. Jones*, 177 F.2d 508 (10th Cir. 1949) a closing agreement case. Further, the Tenth Circuit, after the *LeFever* case, cited *Uinta* as good law in *Benson v. United States*, 120 F.3d 270 (Table, text in Westlaw)(10th Cir. 1997).

In the Second Circuit, summary judgment was reversed on the estoppel issue where, as in the case at bar, there were disputed issues of material fact. *Lignos v. United States*, 439 F.2d 1365, 1368-69 (2nd Cir. 1971). Summary judgment was granted four years later in *Stair v. United States*, 516 F.2d 560 (2nd Cir. 1975) because the facts were stipulated and only issues of law remained. *Id.* at 561, 564. In *Stair*, *Lignos* was cited as controlling authority and the division among the circuits was noted. *Id.* at 563-64.

Similarly, in the Third Circuit, summary judgment was denied on the basis of disputed material facts relating to misrepresentation and detrimental reliance in *Bank of New York v. United States*, 170 F.2d 20, 24 (3rd Cir. 1948). Forty-five years later, summary judgment was granted in favor of the government in *Aronsohn v. Commissioner*, 988 F.2d 454 (3rd Cir. 1993) on the basis of different, undisputed facts. *Id.* at 455. *Bank of New York* was neither expressly or impliedly overruled by *Aronsohn*.

In the Seventh Circuit, the decisions in *Bennett v. United States*, 231 F.2d 465 (7th Cir. 1956) and *General Split Corp. v. United States*, 500 F.2d 998 (7th Cir. 1974) are entirely consistent and support Petitioner herein. In *Bennett*

judgment on the pleadings in favor of the government was reversed and the matter was remanded for plenary trial because the informal closing agreement was not binding, even though the taxpayer filed both its claim for refund and lawsuit after the statute of limitations had expired for the assessment of additional taxes. *Id.* at 468. Summary judgment was granted in favor of the government in the subsequent case, *General Split*, on different, unique facts involving an integrated agreement involving a "package settlement" which precluded any "equitable way to undo the portion of the settlement reflected in the Form 870-AD." *Id.* at 1003-04. The *General Split* Court noted that "[t]he cases are by no means consistent" and cited *Bennett* as controlling authority. *Id.* at 1002-03.

Contrary to the United States interpretation, the Ninth Circuit's decision in *Whitney v. United States*, 826 F.2d 896 (9th Cir. 1987) clearly teaches that summary judgment should not be granted on the basis of estoppel predicated upon an informal settlement agreement unless there is no dispute as to the material facts relating to any of the traditional grounds for that affirmative defense. *Id.* at 898 n.5. The *Whitney* Court, like the others, noted that the Circuit Courts "have taken divergent views" on this issue. *Id.* at 897. That divergence does exist. The Second, Third, Seventh and Ninth Circuits agree with Petitioners' interpretation herein and are consistent with this Court's ruling in *Botany Mills* that expiration of the statute of limitations, standing alone, does not mandate estoppel. The Fifth Circuit is in accord with the Eighth Circuit decision below, holding that estoppel must lie after the statute of limitations runs. The Sixth Circuit appears to have shifted from following *Botany* to following the Eighth Circuit's *Cain* decision. The Tenth Circuit's position is internally inconsistent with *LeFever*, although facing a different issue, suggesting that *Uinta* was wrongly decided, but with *Benson* subsequently noting *Uinta* as controlling authority. This Court should grant certiorari in order to resolve this divergence.

CONCLUSION

The Petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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